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June 5, 2008

Via Hand Delivery

Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F, Room 1101
Austin, Texas 78753

RE: SOAH Docket No. 582-08-0990; TCEQ Docket No. 2007-1833-UCR; Application of the City of College Station Pursuant to Water Code §13.255(A) to Decertify a Portion of Certificate of Convenience and Necessity No. 11340 of Wellborn Special Utility District (Application No. 35717-C)

Dear Clerk:

Enclosed is the original and 11 copies of City of College Station's Reply to Wellborn Special Utility District's Brief in Support of the ALJ's Proposal for Decision in connection with the above-referenced matter. Please file the original and 11 copies, and have the extra copy filed-stamped and returned to our messenger.

Should you have questions or need to reach me, please call (512) 472-8021.

Sincerely,

Michelle M. Russell
Legal Secretary to Emily W. Rogers

/mmr
Enclosures

cc: All parties on service list

Bickerstaff Heath Delgado Acosta LLP

816 Congress Avenue Suite 1700 Austin, Texas 78701 (512) 472-8021 Fax (512) 320-5638 www.bickerstaff.com

June 5, 2008

Via Hand Delivery

Honorable Roy Scudday
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

RE: SOAH Docket No. 582-08-0990; TCEQ Docket No. 2007-1833-UCR; Application of the City of College Station Pursuant to Water Code §13.255(A) to Decertify a Portion of Certificate of Convenience and Necessity No. 11340 of Wellborn Special Utility District (Application No. 35717-C)

Dear Judge Scudday:

Enclosed is a copy of City of College Station's Reply to Wellborn Special Utility District's Brief in Support of the ALJ's Proposal for Decision in connection with the above-referenced matter. Copies are being filed with the TCEQ and served on each of the parties.

Should you have questions or need to reach me, please call (512) 472-8021.

Sincerely,

Michelle M. Russell
Legal Secretary to Emily W. Rogers

/mmr
Enclosure

cc: All parties on service list

SOAH DOCKET NO. 582-08-0990
TCEQ DOCKET NO. 2007-1833-UCR

APPLICATION OF THE CITY OF COLLEGE STATION PURSUANT TO WATER CODE § 13.255(A) TO DECERTIFY A PORTION OF CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 11340 OF WELLBORN SPECIAL UTILITY DISTRICT (APPLICATION NO. 35717-C)	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CITY OF COLLEGE STATION'S REPLY TO WELLBORN SPECIAL UTILITY DISTRICT'S BRIEF IN SUPPORT OF THE ALJ'S PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, the City of College Station ("City") and files this, its Reply to Wellborn Special Utility District's ("Wellborn") Brief in Support of the ALJ's Proposal for Decision ("PFD") in this case. Wellborn claims that the PFD would be "enhanced" and all of the City's claims would be put to rest if the TCEQ would draw the "simple legal conclusion" that based on section 13.255(a) the TCEQ should declare that the 1992 Agreement does not meet the requirements of section 13.255(a). Specifically, Wellborn argues that section 13.255(a) does not allow entities to enter into contracts relating to the disposition of certificated territory annexed by a city before the annexation because the area has yet to be defined. Wellborn would have this Commission believe that the use of the phrase "[i]n the event that an area is incorporated or annexed by a municipality" means that the agreement to transfer the territory must be executed after the annexation has occurred, and thus, the TCEQ does not have jurisdiction over an agreement as a section 13.255(a) agreement if it is not executed after annexation has occurred. This proposition lacks legal merit and is simply an invitation to Commission to make a

determination about the validity of the contract and to condone Wellborn's deliberate and calculated failure to comply with the terms of an agreement to which it agreed.

While the City agrees that the areas to be served need to be identified before the agreement can be incorporated into the CCN and before the transfer of CCN can occur,[1] nothing in section 13.255(a) expressly or impliedly prohibits parties from entering into prospective agreements whereby the parties set out by contract how they will deal with each other in the future with respect to service territory once identified through annexation. Such a prohibition would be contrary to the legislative intent of section 13.255, to the plain reading of section 13.255(a), and to the principles of freedom of contract, and would be bad public policy.

A. Nothing in section 13.255(a) requires that an agreement be executed after the annexation occurs.

Other than the elements described in the City's Exceptions to the PFD, nothing in section 13.255(a) specifies or dictates what a section 13.255(a) agreement must look like. In fact, the agreements "may provide for single or dual certification of all or part of an area, for the purchase of facilities or property, and *for such other or additional terms that the parties may agree on.*" TEX. WATER CODE ANN. § 13.255(a). Section 13.255(a) does not limit how those areas may be described, when they may be described, or what other terms might be included in the contract. The term "[i]n the event that an area is incorporated or annexed" is merely a condition precedent to transferring annexed or incorporated territory. It is not a mandate as to when an agreement concerning such territory may be executed. To interpret section 13.255(a) otherwise places form over substance, and in light of the strong legislative purpose to have parties "work it out"

[1] For house-keeping purposes, the Commission needs to know how to draw the lines on the map.

described below, Wellborn's hyper-technical reading of section 13.255 would only serve to defeat the purposes of section 13.255.

B. The legislative history of section 13.255 supports the proposition that contracts that contemplate the transfer of territory in the future are section 13.255(a) contracts.

The purpose of Subchapter G of Chapter 13 is to regulate public utilities so as to protect the public interest inherent in the provision of retail public utility service. *See* TEX. WATER CODE ANN. § 13.001 (Vernon 2000). To this end, certificates of convenience and necessity foster the benefits accrued from allowing retail public utilities to function as monopolies. *See* Bradley J. Toben, *Certificates of Convenience and Necessity Under the Texas Public Utility Regulatory Act*, 28 BAYLOR L. REV. 1115, 1116 (1976). Specifically, certificates allow a utility to operate within a specific geographic area without the threat of competition and avoid duplication of efforts. *Id.*

To further these goals, the Legislature has enacted both sections 13.248 and 13.255(a) to facilitate agreements between utilities so as to avoid conflicts over service territory. With respect to section 13.255, the Legislature enacted the provision to help cities and water supply corporations "work out their differences" and avoid ending up in court with respect to the provision of services to newly annexed areas. *Hearing on Tex. H.B. 2035 Before the Senate Comm. on Intergovernmental Relations*, 70th Leg., R.S. (May 28, 1987) (statements of Representative Hinojosa) (copy of tape available at the Texas State Library and Archives).[2]

[2] Representative Hinojosa testified: "Well, the problem is that many times the area that is annexed, even though it's certified to the water supply corporation, is not being supplied with water, because the water supply corporation doesn't have the capability to do so. So that area that is annexed goes without water and basically stops the growth of that particular area of the city, and then the city tries to negotiate with the water supply corporation and, quite frankly, you have a lot of rural water supply corporations that do not wish to negotiate or cooperate with the municipality in trying to resolve this problem, and they end up in court. And what this bill does, it tries to provide an orderly, logical procedure for them to work out the differences . . . ." *Hearing on Tex. H.B. 2035 Before the*

Because water supply corporations, special utility districts, and fresh water supply districts were under no obligation to talk to cities about the transfer of annexed territory and negotiate any arrangement with the cities to resolve service issues related to the annexed areas, the Legislature established a mechanism to do so – section 13.255. *See id.*; *Hearing on Tex. H.B. 2035 Before the House Comm. on Natural Resources*, 70th Leg., R.S. (April 22, 1987) (testimony of Jeff Holberg, City Manager for the City of Belton) (copy of tape available at the House Video/Audio Services).[3] Thus, allowing cities and water supply corporations, special utility districts, and fresh water supply districts to contractually establish a mechanism to resolve disputes about service to annexed areas as they are annexed furthers the goals established by the Legislature when it adopted section 13.255.

C. Wellborn's interpretation of section 13.255(a) is contrary to the State's commitment to contractual freedom and would be bad public policy.

To interpret section 13.255(a) as suggested by Wellborn would be counter to the State's strong commitment to the principles of contractual freedom. *See Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 371 (Tex. 2001). "Legislative permission to contract under certain circumstances does not necessarily imply that contracting under other circumstances is prohibited." *Id.* Accepting Wellborn's argument would have the effect of making the form of the contract paramount over its substance. Moreover, interpreting section 13.255(a) to mean that any agreements transferring territory must be executed *prior* to the annexation would be bad

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Senate Comm. on Intergovernmental Relations, 70th Leg., R.S. (May 28, 1987) (statements of Representative Hinojosa).

[3] Jeff Holberg stated: "It has been my experience in annexing into areas that are experiencing urbanization that water supply corporations holding a certificate aren't obligated to talk to us [*i.e.*, cities]. There is simply no mechanism in existence where we can even discuss, we're left to our own initiative and the willingness of the water supply corporation to respond." *Hearing on Tex. H.B. 2035 Before the House Comm. on Natural Resources*, 70th Leg., R.S. (April 22, 1987) (statements of Jeff Holberg, City Manager for the City of Belton).

public policy. The Commission can have no way of knowing how many already existing contracts such a ruling would affect. By ruling that all section 13.255(a) agreements, to be valid, must be executed after annexation has occurred leaves other contracts that might have the same types of prospective provisions uncertain as to their enforceability and only serves to undermine what the parties believed to be bargained-for consideration.

Finally, ruling on whether the 1992 Agreement is a section 13.255(a) agreement is unnecessary if the Commission intends to dismiss the City's application for lack of jurisdiction. Such a ruling would effectively be a ruling on the validity of the agreement and whether or not an agreement to transfer territory in the future is valid consideration, something the PFD claims the Commission does not have authority to decide. Moreover, by ruling that the 1992 Agreement is not a section 13.255(a) agreement, the Commission would be effectively legitimizing Wellborn's actions to not comply with the agreed terms of the contract.

In sum, nothing in the text or legislative history of section 13.255(a) supports the interpretation that the Legislature intended agreements that were adopted in advance of annexation to be unenforceable. *See Hennessy v. Automobile Owners' Ins. Ass'n*, 282 S.W. 791, 792 (Tex. Comm'n App. 1926). The 1992 Agreement requires Wellborn to transfer water service territory to the City as annexation occurs, and thus meets the requirements of section 13.255(a), something recognized by the United States District Court, Southern Division of Texas, in *City of College Station v. United States Dept. of Agriculture, et al.* 395 F.Supp2d 495, 513 (S.D.Tex. 2005).

WHEREFORE PREMISES CONSIDERED, the City respectfully requests that the Commission decline to adopt Wellborn's proposed conclusion of law, declare that it has jurisdiction over the City's application, decline to issue the Order proposed by the ALJ, and

order the City's application be remanded back to SOAH for further proceedings to make findings as required by section 13.255(a) and to incorporate the terms of the agreement into the respective CCNs.

Respectfully submitted,

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BY: Emily W. Rogers
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ATTORNEYS FOR THE CITY OF COLLEGE STATION

CERTIFICATE OF SERVICE

This is to certify that on this 5th day of June, 2008, a true and correct copy of the foregoing document was served on the following parties via hand delivery:

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Texas Commission on Environmental Quality
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